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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

99-263

In the Matter of)
)
Southwestern Bell Mobile Systems, Inc.)
Petition for a Declaratory Ruling Regarding the)
Just and Reasonable Nature of, and State Law) DA 97-2464
Challenges to, Rates Charged by CMRS Providers)
When Charging for Incoming Calls and Charging)
for Calls in Whole-Minute Increments)

COMMENTS OF 360° COMMUNICATIONS COMPANY

360° Communications Company ("360°")¹ hereby respectfully submits its comments in support of the Petition for Declaratory Ruling ("Petition") filed by Southwestern Bell Mobile Systems ("SBMS").² In its Petition, SBMS seeks Commission guidance on several issues related to charging for calls in whole-minute increments and for incoming calls by commercial mobile radio service ("CMRS") providers. For the reasons set forth below, the Commission should conclude that these practices are "just and reasonable" under Section 201(b) of the Act, and it should clarify that Section 332(c)(3) preempts state law suits challenging these practices.

¹ 360° Communications Company is the country's second largest publicly held cellular company. The company offers wireless voice and data services to more than 2.4 million customers in more than 100 markets throughout 15 states. 360° also provides residential long distance and paging services.

² Public Notice, *Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, DA 97-2464 (rel. Nov. 24, 1997).

I. THE COMMISSION SHOULD FIND THAT CHARGING FOR CALLS IN WHOLE-MINUTE INCREMENTS AND FOR INCOMING CALLS ARE JUST AND REASONABLE PRACTICES UNDER SECTION 201(b) OF THE ACT

Section 201(b) of the Act provides that the "charges, practices, classifications and regulations" for common carrier communications services shall be "just and reasonable."³ As described in the Petition, the Commission generally deems a carrier's rate structure to be reasonable if "it is reasonably related to the cost of providing service,"⁴ and this reasonableness standard seeks to ensure that "rates reflect or emulate market operations."⁵

360° agrees with SBMS that charging for calls in whole-minute increments and for incoming calls is "just and reasonable" under Section 201(b). As SBMS points out, these practices are directly related to the recovery of CMRS carriers' costs associated with originating and terminating mobile calls.⁶ Establishing whole-minute increment rates is just and reasonable because it is an efficient and equitable means of permitting carriers to recover their costs. Similarly, charging for incoming calls clearly falls within the scope of Section 201(b) since a CMRS carrier incurs network and switching costs to terminate calls on its network, as it does in the context of outgoing calls.

³ 47 U.S.C. § 201(b).

⁴ Petition at 7 (quoting *In re United States Transmission Systems, Inc. (Revisions to F.C.C. No. 1)*, 66 F.C.C. 2d 1091, ¶ 5 (1977)).

⁵ *Id.* (quoting *In re Petition of New York State Public Service Commission to Extend Rate Regulation*, 10 FCC Rcd 8187, ¶ 17 (1995)).

⁶ See Petition at 7-8.

Further, a determination of “just and reasonable” is supported by Commission and state acceptance of these practices. Indeed, the Commission specifically addressed the practice of charging in whole-minute increments in the context of interexchange services.⁷ In rejecting a petition for rulemaking that sought to impose per-second billing increments for long distance carriers, the Common Carrier Bureau reasoned that per-second billing would “appear unlikely to benefit consumers” and that avoiding regulation should “increase competitive options.”⁸ In addition, the Commission and several state regulatory agencies (when states had some tariffing authority over CMRS carriers) have accepted charging in whole-minute increments and for incoming calls by allowing tariffs that referenced these practices.⁹

Lastly, the Commission should find that the degree of competition in the CMRS marketplace ensures that the practices at issue are within Section 201(b)’s reasonableness standard. The CMRS marketplace presently allows consumers to choose among a wide range of competitive services that offer a variety of rate options, calling plans, and features. Such competition serves to ensure reasonable practices by requiring CMRS carriers to develop service options tailored to meet consumer demand. For example, as SBMS notes, competition in the CMRS market has led to the introduction of a variety of rate and service options, such as plans that offer the first minute of calling for free and service options where the “calling party” pays

⁷ See Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Donald L. Pevsner, Esq. (dated Dec. 2, 1993).

⁸ *Id.* at 1-2.

⁹ See Petition at 7. SBMS also includes examples to two tariffs filed with state commissions in its Petition. Petition at Tab B & Tab C.

for the charges associated with placing a CMRS call.¹⁰ In light of these market forces, there is little concern that whole-minute charges and charging for incoming calls are unreasonable because consumers are free to select among service options and carrier practices are constrained by the competitive market.

II. THE COMMISSION'S PREEMPTIVE AUTHORITY UNDER SECTION 332(C)(3) OF THE ACT PRECLUDES STATE LAW CHALLENGES TO THE RATES CHARGED BY CMRS CARRIERS

The Petition also correctly analyzes the extent of the Commission's authority to preempt state regulation of CMRS rates under Section 332(c)(3) of the Act. The plain language of Section 332(c)(3) states that "no State . . . shall have any authority to regulate . . . the rates charged by any commercial mobile service [provider]."¹¹ Consistent with this statutory framework, SBMS urges the Commission to clarify that the term "rates charged" used in Section 332(c)(3) must at least include: (1) which services the carrier charges for and (2) how much a carrier decides to charge for such services.¹² From such a conclusion, it follows that state law claims concerning whole-minute increment rates and charges for incoming calls are preempted under Section 332(c)(3) because any judicial determination of such claims necessarily involves impermissible state regulation of CMRS rates.

The Commission should clarify the scope of Section 332(c)(3) consistent with the approach suggested by SBMS. Charging in whole-minute increments and for incoming calls

¹⁰ See Petition at 5-6.

¹¹ 47 U.S.C. § 332(c)(3).

¹² See Petition at 14.

properly falls within the "rates charged" language of Section 332(c)(3) since these practices are part and parcel of determining customer rates. The establishment of rate elements -- including the measurement of a reasonable rate increment and the amount charged for this increment -- is an integral component of ratemaking. Similarly, a decision by a carrier to charge for incoming calls in order to recover the costs of providing this service also is at the core of ratemaking -- specifically, whether to charge for a particular service in the first instance. Any interpretation of Section 332(c)(3) that fails to permit carriers to make these fundamental rate setting choices would contravene Congress's explicit goal of allowing the market to govern the provision of CMRS services.¹³

Both the Commission and the courts have recognized the general preemptive authority contained in Section 332(c)(3).¹⁴ Consistent with including charging in whole-minute increments and for incoming calls within the scope of "rates charged," it follows that state law claims challenging these practices violate Section 332(c)(3). These claims, regardless of their form, are preempted because they effectively seek rate regulation of CMRS providers' services.¹⁵ First, as

¹³ Such an approach, however, allows a state to retain sufficient latitude to regulate the "other terms and conditions" of CMRS services in a manner contemplated by Congress. See H.R. Rep. No. 103-111, at 261 ("Committee Report") (noting that by "terms and conditions" the Committee, *inter alia*, "intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters").

¹⁴ For Commission determinations, see *Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services (Second CMRS Report and Order)* 9 FCC Rcd 1411, 1504 (1994); *Petition of New York State PSC*, 10 FCC Rcd at 8190 (noting that Section 332(c)(3) "express[es] an unambiguous congressional intent to foreclose state regulation" over CMRS rates). For judicial determinations, see, e.g., *Connecticut Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842, 846 (2d Cir. 1996); *In re Topeka SMSA Ltd. Partnership*, 917 P.2d 827, 832 (Ks. 1996).

¹⁵ This problem is particularly acute given the fact that many court challenges to the
(Continued...)

the Petition notes, judicial proceedings will invariably require a court to either impermissibly establish a retroactive rate¹⁶ or make a judicial determination of a reasonable rate.¹⁷ The United States Supreme Court specifically has recognized that damage awards can be tantamount to state regulation of rates.¹⁸ Second, injunctive relief would constitute rate regulation since it would establish ratemaking methods by judicial order, rather than by competition as Congress intended.¹⁹ As such, these claims are precluded by Section 332(c)(3).

Finally, the effect of a Commission decision not to preempt these claims would be to undermine the jurisdictional structure set forth by Congress in the Act. Congress made clear that the intent behind Section 332(c)(3) was to "establish a Federal regulatory framework to govern the offering of all commercial mobile services."²⁰ Further, in amending Section 2(b) of the Act to clearly set forth this objective, Congress explained that its framework was intended to "foster the growth and development of mobile services that, by their nature, operate without regard to

(...Continued)

CMRS ratemaking decisions at issue have been filed as class action lawsuits and thus any ratemaking determination made by the court will extend to a broad class of subscribers.

¹⁶ See Petition at 18-19 (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Hardy v. Claircom Communications Group*, 937 P.2d 1128, 1132 (Wash. Ct. App. 1997); *In re Comcast Cellular Telecomm. Litig.*, 949 F. Supp. 1193, 1204 (E.D. Pa. 1996); *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996)).

¹⁷ See Petition at 21 (citing *Wegoland Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1121-22 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 17, 21 (2d Cir. 1994)).

¹⁸ See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); see also *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

¹⁹ See *Comcast*, 949 F. Supp. at 1201.

²⁰ H.R. Rep. 103-213, at 490 (1993) ("Conference Report").

state lines as an integral part of the national telecommunications infrastructure.”²¹ Allowing the provision of CMRS to be governed by a patchwork of potentially inconsistent state decisions clearly runs contrary to this goal and the plain meaning of Section 332(c)(3).

III. CONCLUSION

For the foregoing reasons, the Commission should grant the relief requested by SBMS. Specifically, it should rule that charging for CMRS calls in whole-minute increments and for incoming CMRS calls are just and reasonable under Section 201(b), and that state law claims directly or indirectly seeking to regulate the “rates charged” by CMRS providers for any mobile service are barred by Section 332(c)(3). This conclusion is consistent with both Section 332(c)(3) and the clear Congressional goal to promote the nationwide deployment of commercial mobile radio services.

Respectfully submitted,

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January 7, 1998

²¹ See 47 U.S.C. § 152(b); Committee Report at 260.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 1998, I caused copies of the foregoing
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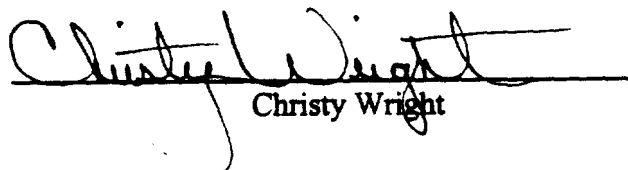
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